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In the Supreme Court of the United States

OCTOBER TERM, 1990

JANICE G. CLARK, ET AL., APPELLANTS

v.

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. Whether the district court erred in permitting elections to be conducted and the winners of those elections to be provisionally instated in office under changes in election procedure to which the Attorney General had objected under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the Attorney General's preclearance of legislation providing for changes affecting voting in certain districts served to preclear earlier-enacted legislation providing for other changes affecting voting in those districts.

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INTEREST OF THE UNITED STATES

This case involves enforcement of the mandate of Section 5 of the Voting Rights Act of 1965 that covered jurisdictions refrain from implementing changes affecting voting "unless and until" those changes have been precleared. 42 U.S.C. 1973c. In addition, this case raises important questions concerning the procedures for submitting and preclearing changes. Under Section 5, the Attorney General is vested with responsibility to review election law changes submitted for administrative preclearance, as well as to initiate suits to prevent implementation of unprecleared changes. The Court's disposition of this case will affect the Attorney General's execution of these statutory duties.

On October 31, 1990, in response to this Court's request, the Solicitor General submitted a brief expressing the views of the United States on appellants' application for an injunction pending appeal. The brief generaliy supported the application, which this Court subsequently granted in part and denied in part. The United States also participated in this case as amicus curiae in the district court.

STATEMENT

1. In 1986, appellants filed a lawsuit challenging Louisiana's use of multimember and at-large voting schemes for elections for certain district (trial) and court of appeals judgeships under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments. Having uncovered evidence that the State had failed to obtain Section 5 preclearance for many changes affecting voting for judicial offices, appellants filed an amended complaint in 1987 to request that a three-judge court be convened under Section 5. Appellants asked that the court enjoin further use of the unprecleared changes.

2. During 1988 and 1989, the State attempted to obtain administrative preclearance of changes that appellants discovered had not been precleared, although many of those changes had been made by statutes enacted years earlier. By letters of September 23, 1988, May 12, 1989, and September 17, 1990, the Attorney General granted preclearance for some of those changes, but objected to others. See J.S. App. 108a-126a, 127a-135a, 136a-167a.

3. The State nonetheless proceeded with plans to hold elections for the seats as to which objections had been interposed; at the same time, the State took no steps to secure judicial preclearance pursuant to a Section 5 declaratory judgment action. Meanwhile, elections for some of

the unprecleared seats had been blocked by an injunction issued by the single-judge district court in the Section 2 case. On July 23, 1990, appellants moved the three-judge court to enjoin the State from holding elections for seats not blocked by the Section 2 injunction. The United States supported appellants' motion.

On September 28, 1990, the three-judge court denied appellants' motion. J.S. App. 90a. The court did, however, enjoin the winning candidates from taking office, pending further orders of the court. *Id.* at 91a. The first-round elections were to be held as originally scheduled on October 6, with any necessary runoff elections scheduled for November 6.[1]

4. Also on September 28, 1990, the Fifth Circuit, sitting en banc, ruled in *LULAC* v. *Clements*, 914 F.2d 620 (1990), cert. granted, No. 90-974 (Jan. 18, 1991),[2] that judges are not "representatives" for purposes of Section 2(b) of the Voting Rights Act, 42 U.S.C. 1973(b). See J.S. App. 82a-83a. The State immediately moved the single-judge district court to dissolve the injunction it had entered under Section 2. Because elections for the seats involved in the Section 2 case were now – for the first time – likely to be scheduled, appellants asked the three-judge district court on October 1, 1990, to enjoin unprecleared elections in districts subject to the Section 2 injunction.

5. On October 2, the single-judge district court dissolved its Section 2 injunction in light of the Fifth Circuit's decision in *LULAC*, ordering that elections for the dis-

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[1] Because Louisiana law imposes a majority-vote requirement for victory in an election (see La. Rev. Stat. §§ 18:401, 18:481 (West 1979)), two rounds of elections are often required.

[2] The United States is filing a brief amicus curiae in this Court supporting reversal in *LULAC*. The United States is also the petitioner in *United States* v. *Roemer*, cert. granted, No. 90-1032 (Jan. 18, 1990), in which related issues are raised. See n.28, *infra*.

tricts that had been subject to the injunction should proceed roughly one month later than originally scheduled. J.S. App. 81a-84a. The court set the first-round elections for November 6, with runoffs on December 8.

Also on October 2, the three-judge Section 5 court denied appellants' motion to enjoin the unprecleared elections that were now—with the lifting of the Section 2 injunction by the single-judge court—scheduled for November 6/December 8. J.S. App. 86a-87a. The court held, however—as it had in its September 28 order with respect to seats not covered by the Section 2 injunction—that the winners of the November 6/December 8 elections could not take office, pending further order of the court. *Id.* at 87a.

6. On October 6, 1990, elections for seats that had not been subject to the Section 2 injunction were held. See J.S. App. 31a-32a. Absentee voting for those seats had begun on September 24, 1990. *Id.* at 32a.

7. On October 22, 1990, the three-judge court issued yet another order. J.S. App. 68a-81a. That order divided the seats at issue in this case into two categories: those as to which the court determined that the Attorney General had interposed valid objections, and those that the court regarded as having been precleared in spite of the Attorney General's objections.

a. With respect to the first category seats (J.S. App. 72a-73a),[3] the court held again that the elections could proceed. However, the court also set forth a plan under which, if the State instituted a declaratory judgment action in the United States District Court for the District of Columbia within 90 days (*id.* at 74a-75a), the winning candidates for those seats could take office provisionally. If the State won its declaratory judgment action (or persuaded the Attorney General to withdraw his objections),

[3] One of the seats listed, Division D of District 34, has in fact been precleared, as recognized in this Court's order of November 5, 1990. 111 S. Ct. 399.

the provisionally instated candidates would remain in office. *Id.* at 75a-76a. If, however, the State failed to obtain preclearance through one of these avenues, the provisionally instated candidates would remain in office only for 150 days after final judgment in the declaratory judgment action. *Id.* at 76a-77a. Of course, the State retained the right to conduct new elections under any revised election plan for which it could obtain Section 5 preclearance. *Id.* at 75a-76a.

In an opinion issued on October 31 (J.S. App. 1a-56a), the court held that Section 5 applies to judicial elections (*id.* at 21a) and that "the state had to obtain preclearance for additional judicial positions in a district or circuit which had previously been precleared by the Attorney General." *Id.* at 21a-22a. Turning to the question of relief, the court recognized that "the state itself is responsible for the consequences of its failure to comply with Section 5." J.S. App. 36a. In the court's words, "[t]he State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act." *Id.* at 7a n.10. The court concluded, however, that the elections should be allowed to go forward, because "the potential harm to all of the citizens of Louisiana outweighs the potential harm, if any, of allowing the elections to continue, with the winning candidates being seated on a provisional basis." *Id.* at 36a-37a.

The court observed that several factors played an important role in reaching this conclusion. First, in the court's view, by October 22, the candidates for the seats in question had a reliance interest in the election going forward.[4] J.S. App. 32a, 35a. Second, the court was per-

[4] The candidates' reliance interest was based on the court's September 28 decision to permit the October 6/November 6 elections to go forward and the court's October 2 decision to permit the November 6/

suaded that appellants' requests for injunctions—made on July 23 and October 1—"came very close to the October 6 election day." *Id.* at 34a. By those dates, "qualifying for some of these judicial positions had begun." *Id.* at 31a-32a. Third, the court noted that the October 6 and November 6 dates coincided with national elections, a feature that was desirable "to ensure high voter participation." *Id.* at 33a.[5] Finally, the court noted that its scheme for provisional instatement of winning candidates in office would minimize the injury to the interests of appellants, while preventing possible challenges to the validity of criminal and civil judgments. *Id.* at 35a-37a.

b. The three-judge court ordered that elections could proceed as scheduled and that winning candidates could be sworn into office to serve regular terms for those seats—listed in Part I of its order (J.S. App. 70a-71a)—that the court acknowledged had been subject to Section 5 objections by the Attorney General, but which the court nonetheless determined had been effectively precleared when the Attorney General precleared later changes affecting the same districts. The court reasoned (*id.* at 27a):

> [T]he change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act.

Thus, the court held (J.S. App. 23a-24a):

> [W]hen the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district.

The court recognized that it had no power "to equitably preclear a statute" (J.S. App. 30a n.43), but found that the earlier enacted changes were submitted to the Attorney General "in an unambiguous manner," and approved by him. *Id.* at 28a.[6]

8. On October 29, 1990, appellants applied to this Court for an injunction to halt the upcoming elections for all seats involving changes to which the Attorney General objected. On October 31, the United States, responding to this Court's invitation, filed a memorandum in support of the application.

By orders of November 2 and November 5, 1990, this Court granted appellants' application in part, enjoining the State from holding elections in districts involving changes that the district court found subject to valid objections, pending disposition of this appeal. The Court denied appellants' application in all other respects, thus allowing elections to proceed for seats involving changes that the district court considered to have been precleared by the Attorney General's approval of later-enacted legislation. 111 S. Ct. 376, 399.

9. In January 1991, the State filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance for the changes that the district court found had not been precleared. That action is pending.

SUMMARY OF ARGUMENT

1. The district court in this case acknowledged that, at the time of its October 22 order, the State planned to go

December 8 elections to go forward, albeit with no instatement in office pending further order of the court. J.S. App. 31a-34a.

[5] The court also alluded to unspecified voter confusion that might be caused if the elections were stopped at such a late date. J.S. App. 33a.

[6] The district court later added an additional seat—District 20, Division B—to the list of precleared seats in Part I of its October 22 order. J.S. App. 53a.

forward with elections employing unprecleared changes in voting procedure. Nonetheless, under the guise of a remedial determination, the district court sanctioned what was in effect a violation of Section 5: the court permitted the State to hold the elections and permitted the winners to take office provisionally, pending the completion of what can reasonably be expected to be a lengthy Section 5 declaratory judgment action in the federal district court here in Washington.

The district court's decision not to enjoin the elections was wrong. Although a Section 5 district court retains significant remedial discretion, that discretion ought not extend to permitting an acknowledged Section 5 violation to proceed despite timely efforts to enjoin it. The district court's decision poses a threat to the general enforcement plan of Section 5, the purpose of which is to shift the advantages of time and inertia from the State to the Section 5 plaintiff. Moreover, because the elections took place despite the fact that the Attorney General had interposed Section 5 objections, the district court's decision also specifically threatens the integrity of Section 5's administrative preclearance mechanism. Finally, Section 5 mandates that unprecleared changes not have the force of law. The fact that the court's order permitted the winners only to take office provisionally (thereby giving effect to the unprecleared changes only for an interim—albeit lengthy—period) does not alter the conclusion that the order was improper.

2. The district court also decided that some of the changes at issue in this case had been precleared and that elections could proceed employing those changes, even though the Attorney General had specifically interposed objections to them. The district court held that the Attorney General had effectively precleared those changes when he precleared later changes affecting the same districts. In most instances of this type, the changes at issue

involved the addition of seats to be elected at-large in a given district. In some cases, other changes—such as the addition of designated posts or subdivision of districts—are involved.

The district court's decision conflicts with this Court's decision in *McCain* v. *Lybrand*, 465 U.S. 236 (1984), which elucidated the structure and operation of Section 5. As *McCain* made clear, the administrative preclearance process applies to *changes* affecting voting, and the Attorney General's decision not to object to a given submission thus applies only to the *changes* that are clearly and unambiguously identified in that submission. Prior, unprecleared changes affecting the same district, no matter how similar to the change identified in a given submission, are not automatically precleared when the Attorney General preclears that submission. Thus, when the Attorney General preclears a submitted change increasing the number of judgeships from 5 to 6, he preclears that *change* only; if the State neglected to submit a prior change increasing the number from 2 to 5, that prior change has not been precleared. The district court's holding to the contrary would require the Attorney General, before preclearing a given voting change, to investigate the history of all prior changes affecting that district. That would require a heroic effort; literally thousands of voting changes are submitted for preclearance each year, and thus the district court's holding would needlessly complicate the Attorney General's ability to carry out his Section 5 preclearance responsibilities.

ARGUMENT

A. THE DISTRICT COURT ERRED IN ALLOWING ELECTIONS INVOLVING VOTING CHANGES AS TO WHICH THE ATTORNEY GENERAL INTERPOSED CONCEDEDLY VALID OBJECTIONS TO GO FORWARD PROVISIONALLY [7]

As the three-judge district court recognized, its jurisdiction was limited to determining "(i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983). See J.S. App. 20a. With respect to the first two issues, the district court correctly determined that the changes affecting voting at issue were covered by Section 5 and had been the subject of objections interposed by the Attorney General.[8] The court erred, however, in deciding that an appropriate remedy was to permit elections to go forward and the winners to be seated provisionally.

1. The general mandate of Section 5 is that jurisdictions not implement voting changes "unless and until" they have been precleared. 42 U.S.C. 1973c. Under this mandate, changes affecting voting "are not now and will not be effective as laws until and unless cleared pursuant to § 5."

[7] Contrary to appellees' suggestion (Mot. to Dis. or Aff. 7-8), the district court's ruling permitting elections to go forward is not moot. Although the regular 1990 election season has passed, this Court's order of November 5, 1990, which by its own terms will remain in effect only until "the sending down of the judgment of this Court" (111 S. Ct. 400), is the only bar on the State's ability to schedule elections for the seats at issue in this appeal. See, *e.g.*, *Democratic Party* v. *Wisconsin*, 450 U.S. 107, 115 n.13 (1981); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

[8] The Attorney General has delegated his Section 5 preclearance authority to the Assistant Attorney General, Civil Rights Division, 28 C.F.R. 51.3.

Connor v. *Waller*, 421 U.S. 656 (1975) (per curiam). Failure to obtain preclearance "renders the change unenforceable." *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 (1982).

If a Section 5 plaintiff establishes that a State has attempted to implement unprecleared changes affecting voting and seeks to enjoin the elections, the appropriate remedy is issuance of an injunction barring the State from holding elections under the unprecleared procedures. That, in our view, is the only remedy that complies with the statutory requirement that changes not be implemented "unless and until" precleared. In addition, that is the only remedy consistent with Section 5's purpose to shift the "advantage of time and inertia" (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966)) from the State to those seeking to enforce the statute. Thus, this Court has instructed Section 5 courts "to issue injunctions restraining the further enforcement of [unprecleared] enactments until such time as the States adequately demonstrate compliance with § 5." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 572 (1969).[9]

By contrast, the remedy adopted by the district court in this case—holding of elections followed by provisional seating of winners—permits the State to engage in a new violation of Section 5 and reap the fruits of that violation while a lengthy declaratory judgment action is filed and litigated through the district court and on appeal. The fact that the district court crafted this remedy in the exercise of its equitable powers does not make the district court's decision appropriate. As this Court recently reiterated, "courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of

[9] Accord *Perkins* v. *Matthews*, 400 U.S. 379, 397 (1971); *Hathorn*, 457 U.S. at 271; *Georgia* v. *United States*, 411 U.S. 526, 541 (1973); see also *Canady* v. *Lumberton City Bd. of Elections*, 454 U.S. 957 (1981) (granting injunction to prevent voting in upcoming election by residents of unprecleared annexed district).

law." *INS* v. *Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 192 (1893)). At least absent a showing by the defendant that the most extreme circumstances require a relaxation of the admittedly "unusual and severe" Section 5 remedy (*Morris* v. *Gressette*, 432 U.S 491, 501 (1977)), a Section 5 court may not permit illegal elections to go forward over a plaintiff's timely request for injunctive relief.

2. Although Section 5 plaintiffs who seek timely relief are ordinarily entitled to an injunction prohibiting the State from implementing unprecleared changes, appellants' claim for an injunction in this case was particularly strong because the changes at issue had all been the subject of Section 5 objections interposed by the Attorney General. Section 5 does not require a State to seek preclearance of voting changes from the Attorney General; the State can, instead, repair to the federal district court for a declaratory judgment. If, however, the State does seek to employ this "rapid method of rendering a new state election law enforceable" (*Allen*, 393 U.S. at 549),[10] it must recognize that the Attorney General's decision is final and binding (at least until the State has obtained a contrary ruling in a Section 5 declaratory judgment action). The Attorney General's decision not to object is the *only* means by which a State can enforce a voting change under Section 5 without resorting to a declaratory judgment action. Therefore, the Attorney General's interposition of an objection on the ground that he "is unable to determine that the change is free of discriminatory purpose and effect" (28 C.F.R. 51.52(c)) definitively precludes implementation of the voting change.

[10] See also *Morris* v. *Gressette*, 432 U.S. at 503-505 (administrative preclearance reflects congressional "desire to provide a speedy alternative method of compliance"); *Georgia* v. *United States*, 411 U.S. at 536-540 (60-day limit).

Congress reaffirmed this basic understanding when it extended the Voting Rights Act in 1982. At that time, Congress exhibited "virtual unanimity" on the need to extend the Section 5 enforcement scheme.[11] S. Rep. No. 417, 97th Cong., 2d Sess. 9 (1982). Referring to precisely the deficiencies that the State exhibited in this case, the Senate Committee Report explained:

> [D]isappointing gaps in compliance with Section 5 are significant evidence of the continuing need for the preclearance requirement. * * * At least as disturbing as * * * failures to preclear changes is the frequency with which jurisdictions refuse to comply with Section 5 after objections are entered. The law is unambiguous: a Section 5 objection is final and binding unless a contrary judgment is obtained from a three-judge court in the District of Columbia.

Id. at 12-13.[12]

3. The fact that the district court's remedy permitted only "provisional" instatement of the electoral winners pending filing and disposition of the State's declaratory judgment action does not make it any more consistent with Section 5's general prohibition of *any* implementation of unprecleared changes. To be sure, the district court rightly apprehended that, at the time of its October 22 order, the State still had available an avenue for obtaining preclearance—the filing of a declaratory judgment action in the District Court for the District of Columbia. More-

[11] Cf. *Georgia* v. *United States*, 411 U.S. at 533 (relying on Congress's five-year extension of Section 5 without change in 1970).

[12] The Committee Report cited two types of noncompliance, both of which are evident on the record of this case. "First, there has been continued widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change. Second, there continue to be instances of changes having been implemented despite a prior Department of Justice objection." S. Rep. No. 417, *supra*, at 12. See also *id.* at 47-48.

over, it is true that, if the State ultimately were successful in such an action, that success would obviate the need for the district court here to make some difficult determinations as to whether and how to permit the State to fill the large number of affected judicial seats. Nonetheless, the mandate of Section 5 is to deny legal effect to unprecleared voting changes. The fact that preclearance may ultimately be obtained provides no basis to permit the State to employ unprecleared changes – in short, to violate Section 5 – in the interim.

Indeed, this case vividly illustrated the threat to the Section 5 enforcement plan of permitting a State the opportunity to implement changes while a declaratory judgment action is filed and litigated. Most of the objections lodged by the Attorney General were embodied in letters dated September 23, 1988, and May 12, 1989.[13] See J.S. App. 108a-126a, 127a-135a. The State thereupon sat on its hands; it made no effort to obtain a declaratory judgment concerning the objected-to changes until January 18, 1991. Including any appellate review sought in this Court, two to three years could easily elapse before the recently filed declaratory judgment action reaches final judgment. If the judgment is ultimately that the changes have a discriminatory purpose or effect, the judges who were seated under the three-judge court's order will retain their seats for an additional 150 days. See J.S. App. 76a. Thus, conservatively calculated, the effect of the district court's action would be to permit the State to implement unprecleared voting changes for a period of four years or more after notice of the Attorney General's objections. That remarkable result flies in the face of Section 5's purpose to

[13] The September 17, 1990, letters (J.S. App. 136a-165a) declined to reverse the objections set out in the two earlier letters, as well as interposing objections to several later-enacted changes. Thus, the State has been on notice of the Attorney General's objections to the vast majority of the changes at issue here since 1988 or early 1989.

shift the advantages of time and inertia from the State to the Section 5 plaintiff.

4. None of the reasons advanced by the district court in its October 31 opinion are adequate to justify an exception to Section 5's rule prohibiting the holding of elections using unprecleared voting changes.

a. Contrary to the court's suggestion (J.S. App. 34a), appellants' motion to enjoin the elections appears to have been timely. By July 1987, appellants had filed an amended complaint putting the State on notice that it was using unprecleared voting changes, and appellants' July 23, 1990, motion to enjoin the elections was filed over two months prior to the October 6 date of the first-round elections. Nor was appellants' October 1 motion untimely, in light of the fact that the seats that were subject to that motion were still subject to the Section 2 injunction when the motion was filed. Consequently, no election was scheduled for those seats at the time the motion was filed; the November 6/December 8 election schedule for those seats was only set the following day, when the single-judge Section 2 court dissolved the Section 2 injunction. Only with the Fifth Circuit's en banc decision in *LULAC* and the State's consequent motion to lift the Section 2 injunction did the need for appellants' October 1 motion arise, and the motion was filed promptly after those developments.

b. The existence of unspecified "confusion" on the part of the voters could not justify the district court in permitting elections employing concededly invalid voting changes to go forward. As this Court has recognized, when elections of doubtful validity are held, "[p]otential candidates who considered the [elections] illegal * * * may have deliberately stayed away." *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 167, 177 (1985). Far from counseling in favor of allowing elections to go forward, any "confusion" surrounding the unprecleared seats provided reason to postpone elections until valid procedures were in place.

c. Nor does the court's concern with preventing possible questioning of the validity of criminal and civil judgments (J.S. App. 37a) justify allowing invalidly elected candidates to assume office provisionally. Indeed, the provisional status of these judges—and the use of procedures that are invalid under federal law to elect them—might provide the very ammunition needed to challenge the legitimacy of their rulings. In any event, as we point out below, state law appears to recognize several means for filling judicial seats that may have become vacant if elections were enjoined. See note 26, *infra*.

d. The other reasons cited by the district court cannot justify its decision to sanction the State's prospective violations of Section 5. The desire to ensure "high voter participation" (J.S. App. 33a) does not provide a reason for allowing elections to proceed under invalid procedures. Nor does the fact that by October 22 candidates had expended time and expense in preparing for the elections (*id.* at 32a) alter the conclusion that the district court should have enjoined the elections. The candidates were on notice of the pendency of this action. At the time of the district court's October 22 order, the November 6/December 8 elections had only been scheduled since October 2, when the Section 2 court had lifted its injunction. And the three-judge court's own October 2 order specifically provided that winning candidates would *not* be permitted to take office "pending further orders of th[e] court." *Id.* at 87a.

5. The district court mistakenly believed that its decision to allow the State to give provisional effect to elections conducted under invalid procedures "closely parallels action taken in similar cases by the United States Supreme Court and other three-judge courts." J.S. App. 39a. In support of that conclusion, the district court cited *Hampton County*, 470 U.S. at 182-183, *Berry* v. *Doles*, 438 U.S. 190, 193 (1978), *Perkins* v. *Matthews*, 400 U.S. at 396-397, and *Georgia* v. *United States*, 411 U.S. at 541. None of

the cited authorities, however, supports the district court's decision.

a. With respect to *Hampton County*, *Berry* v. *Doles*, and *Perkins* v. *Matthews*, the district court ignored two (and with respect to *Hampton County*, three) crucial distinctions between the situation it faced in late October and the facts in those cases. First, in this case, the district court decided to permit the elections to be held and the winners installed in office while preclearance was sought; in *Hampton County*, *Berry*, and *Perkins*, the issue was whether to remove individuals who had already taken office while the State sought preclearance. Second, in this case, the State had sought and been denied administrative preclearance before the district court was asked to enjoin the elections; in *Hampton County*, *Berry*, and *Perkins*, the State had never sought administrative preclearance for the covered change. Finally, in this case, the district court postponed the remedy for a period that could easily last several years, while the State's declaratory judgment action is filed and litigated to final judgment; in *Hampton County* at least, the Court expressly held that the district court was to postpone the remedy to allow time for the State "to submit these changes *to the Attorney General* for approval." 470 U.S. at 182 (emphasis added).[14]

Hampton County, *Berry*, and *Perkins* thus establish that, where a Section 5 plaintiff seeks to set aside invalidly conducted elections, a brief postponement of that remedy may be appropriate so that the State can pursue the alternative, "rapid method of rendering a new state election law enforceable." *Allen* v. *Board of Elections*, 393 U.S. at

[14] In *Perkins*, the Court spoke of postponing the setting aside of invalid elections while the State sought "federal approval" (400 U.S. at 396), while in *Berry*, the Court referred to submission "to a forum designated by Congress" for "approval" (438 U.S. at 192-193). The Court thus did not distinguish between the administrative and judicial preclearance procedures created by Section 5.

549. If the Attorney General preclears the changes involved, the slight delay may avoid the disruption caused by removing an elected official from office, along with the cost and inconvenience of filling the office through some other means later. *Hampton County, Berry*, and *Perkins* do not in any way support the district court's decision to delay remedy of a Section 5 violation for years so that a State can make a *second* attempt at obtaining preclearance, this time through the declaratory judgment process.[15]

b. *Georgia* v. *United States*, also relied on by the district court (see J.S. App. 46a-48a), involved the redistricting of the entire Georgia state legislature. As in *Hampton County, Berry*, and *Perkins*, elections in *Georgia* had already been held when the Court reached the remedial issue; in *Georgia*, the elections were held pursuant to this Court's own action staying a district court injunction pending appeal. See 411 U.S. at 541. In a two-

[15] The district court also purported to rely on several district court cases. See J.S. App. 39a-47a. *Wilson* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 1299, 1303 (M.D. N.C. 1970), involved a district court's refusal to set aside the results of primary elections because the plaintiffs had failed to litigate their request for the injunction in a timely fashion. In *Moore* v. *Leflore County Bd. of Election Comm'rs*, 351 F. Supp. 848, 852-853 (N.D. Miss. 1971), the district court itself noted the "peculiar conditions" in which the court seated candidates provisionally because that was the only practicable method to fill the offices involved "for the period of time needed to arrange for the new election." See also *Edge* v. *Sumter County School Dist.*, 541 F. Supp. 55, 57 (M.D. Ga. 1981), aff'd, 456 U.S. 1002 (1982). In one case, *United States* v. *County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala.), aff'd, 430 U.S. 924 (1977), elections do appear to have proceeded and winners to have assumed office provisionally. The published opinion gives no indication that the validity of the remedy was at issue between the parties. Nor was this Court's affirmance a judgment on the merits of the remedy; the appeal was taken by the defendant, who did not raise any remedial issues.

sentence discussion of the appropriate remedy, the Court held that it would be "inequitable" to set aside the results of the offending elections and order new elections to be held. *Ibid.*

This Court's order in *Georgia* did not alter the status quo or permit a further violation of Section 5. By contrast, the district court's order here specifically permitted the State to alter the status quo by holding new elections and in effect sanctioned new violations of Section 5. *Georgia* thus did not in any sense authorize the district court to countermand Section 5's mandate that changes affecting voting are invalid "unless and until" precleared. Cf. *INS* v. *Pangilinan*, 486 U.S. 875 (1988).

c. Finally, the district court decision in *Brooks* v. *Georgia State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989), modified (May 29, 1990), aff'd, 111 S. Ct. 288 (1990), also provides no support for the district court's decision in this case. See J.S. App. 46a n.65. Although the district court in *Brooks* determined that the State had a compelling interest in filling the judicial seats at issue, the court did *not* fill those seats by permitting elections to go forward and provisionally seating the winners. Instead, the court in *Brooks* took remedial steps that should have been employed by the district court here: the court enjoined future elections, and allowed the State of Georgia to permit incumbents to remain in office beyond the expiration of their terms. Although that remedy permitted the State to continue to gain the benefit of its *past* violations of Section 5, it did not in effect permit the State to commit *new* violations. See pp. 28-29, *infra*.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT APPROVAL OF LATER AMENDMENTS SERVED TO PRECLEAR EARLIER VOTING CHANGES

In Part I of its October 22, 1990, order (J.S. App. 70a-71a), the district court held that the Attorney General's preclearance of changes affecting certain districts operated to preclear changes made by earlier statutes affecting those districts, even though those earlier changes had since been submitted for preclearance and had become the subject of objections.[16] In ruling that preclearance of later changes operates to preclear earlier changes that the State had not submitted for preclearance, the Court relied on legal assumptions that are inconsistent with *McCain* v. *Lybrand*, 465 U.S. 236 (1984). In addition, to the extent that the court made factual findings that the State submitted the changes at issue "in an unambiguous manner" (J.S. App. 28a), those findings lack support in the record and should be reversed as clearly erroneous.

1. *McCain* v. *Lybrand* concerned a 1966 South Carolina statute that created a new form of government for a particular county. The statute provided that candidates for the new three-member county council would be elected by all county voters in at-large elections, but candidates would be required to reside in and run from three residency districts. The State failed to submit the 1966 statute for preclearance, although the county regularly conducted elections under it. In 1971, the General Assembly amended

[16] Among the seats listed in Part I of the district court's order were five seats that the Attorney General has in fact precleared or that were enacted prior to the effective date of the Voting Rights Act: Divisions A, B, C, and D in District 17, and Division C in District 32. The court's order should be upheld with respect to those seats.

the 1966 Act to increase the number of residency districts and county council members from three to five. 465 U.S. at 240, 243. The State submitted the 1971 Act for preclearance, and the Attorney General, after requesting additional information – including a copy of the 1966 legislation – declined to interpose any objection "to the change in question." 465 U.S. at 241. In a subsequent Section 5 challenge to the State's implementation of the 1966 changes, the district court reasoned that preclearance of the 1971 amendment, which increased the number of seats on the council but otherwise reenacted the provisions of the 1966 Act unchanged, necessarily constituted approval of the 1966 changes as well. 465 U.S. at 242-243.

This Court reversed. 465 U.S. at 258. The Court explained that the submission procedures for administrative preclearance "should be carefully construed to protect the remedial aims of the Act." *Id.* at 257. Those aims "would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *Id.* at 249 (quoting *United States* v. *Board of Comm'rs*, 435 U.S. 110, 136 (1978). The Court reemphasized the well-settled principle that "the preclearance procedures mandated by § 5 of the Voting Rights Act focus entirely on *changes* in election practices." 465 U.S. at 251. Thus, "[a] request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones cannot be considered an adequate submission of the latter practices." *Id.* at 256-257.

The *McCain* rule – that submission of legislation constitutes only a submission of the identified changes in that legislation – is essential to preserve the Attorney General's ability to scrutinize all voting changes by covered jurisdic-

tions to ensure that they meet the substantive requirements of the Voting Rights Act.[17] As *McCain* explained:

> In evaluating the use of the alternative procedure of submitting proposed changes to the Attorney General, it must be remembered that § 5 "was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act."

Id. at 247 (quoting *Perkins* v. *Matthews*, 400 U.S. 379, 392 n.10 (1971)). The Attorney General receives thousands of requests for preclearance each year.[18] Each change must be subjected to analysis in light of the demographics, voting patterns, and other conditions in the locality to arrive at the often "difficult and complex" judgment as to the presence of a discriminatory purpose or effect. *Georgia* v. *United States*, 411 U.S. at 526. The Attorney

[17] In keeping with *McCain*, 465 U.S. at 257, which places the burden of defining the scope of the preclearance request on the submitting jurisdiction, the Attorney General's regulations require submitting authorities to identify the precise changes for which preclearance is sought, and to specify the preclearance status of prior practices. See 28 C.F.R. 51.27(c) (where scope of submitted change is not clear, jurisdiction must provide "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting"); *id.* at (p) (jurisdiction must provide "[a] statement that the prior practice has been precleared * * * or is not subject to the preclearance requirement"). Substantially the same instructions have been in effect as guidelines since 1971. See 36 Fed. Reg. 18,186 (1971).

[18] For example, in the years 1986-1990, the Attorney General had to review an average of over 17,000 changes each year encompassed in over 3,500 submissions under Section 5. Those numbers can be expected to increase in the next several years, as electoral changes are made in response to the 1990 census.

General lacks the resources to go further and research the history of each piece of submitted legislation, to ensure that all earlier unsubmitted changes affecting voting have been brought to light.

2. With scarcely a mention of *McCain* (see J.S. App. 30a n.43) and no mention of the applicable regulations, the district court held that the State's request for and receipt of preclearance of amending legislation also served to preclear prior changes in voting practices. The Court's reasoning directly contradicts the principles of *McCain*. Whereas this Court held that "sending * * * legislation to the Attorney General merely with a general request for preclearance * * * cannot be deemed a submission of changes made by previous legislation" (*McCain*, 465 U.S. at 256), the district court ruled that "[w]hen the Attorney General approves the amended portion, he not only approves the new act, but necessarily approves the older, reenacted part, which forms part of the new act" (J.S. App. 27a). The district court also reasoned that "when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district" (*id.* at 23a-24a). But the district court in *McCain* applied similar logic and this Court reversed, holding that the Attorney General's preclearance of an increase in the size of an elected body did not operate to preclear the earlier decision to elect a smaller body under the same voting scheme.[19]

[19] The State complains of the Attorney General's alleged "inconsistency" (Mot. to Dis. or Aff. 9, 11) in objecting to earlier-added seats while precleaving later seats in the same district. The merits of the Attorney General's objections are not at issue in a Section 5 "coverage" case; indeed, the Attorney General's decision whether to interpose an objection to a given change is unreviewable by *any* court. *Morris* v. *Gressette*, 432 U.S. 491 (1977); *United States* v. *Board of Supervisors*,

3. As an alternative basis for reversing the district court in *McCain,* 465 U.S. at 251-254, this Court evaluated the evidence, including the State's submission letter, the legislation submitted, and the correspondence from the Attorney General. The Court noted that "the structure and purpose of the preclearance requirement plainly counsel against resolving * * * ambiguities in favor of the submitting jurisdiction." *Id.* at 257. The Court concluded that "to the extent the judgment below may be interpreted as resting upon a factual finding that the Attorney General actually considered and approved the changes made by the 1966 Act in the course of the submission of the 1971 amendment, * * * we are 'left with the definite and firm conviction that a mistake has been committed,' and we thus overturn that finding as clearly erroneous." *Id.* at 257-258 (quoting *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). Similarly, the documents in this case make clear that the State did not unambiguously submit, and the Attorney General did not actually

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429 U.S. 642, 646 (1977) (per curiam). If a State disagrees with the Attorney General's determination, its recourse is a declaratory judgment action in the District Court for the District of Columbia. Consequently, any alleged inconsistency would be irrelevant in this case.

In any event, the mere fact that the Attorney General has objected to an earlier-added seat while preclearing later seats does not demonstrate a genuine inconsistency. Because the Attorney General must analyze each change for which preclearance is requested on the basis of the information available to him at the time the change is submitted, contrary conclusions regarding the addition of several successive seats in the same district may well reflect differences in the information submitted by the State on each occasion. Cf. *Hampton County,* 470 U.S. at 180. In addition, Section 5 mandates an inquiry into the "purpose" of a given change, as well as its "effect." The Attorney General may well correctly determine that a particular enactment was the product of a discriminatory purpose, while a later change affecting the same district was not.

approve, the changes that the district court found to have been precleared.[20]

a. A useful example is provided by two bills enacted by the Louisiana legislature in 1975, Acts No. 114 and 305. Act 114 added one seat to each of the three election districts in the First Circuit and one at-large seat to each of the Second and Third Circuits. Act 305 added designated posts in the First Circuit. Some years later, the State enacted another statute, Act No. 3 of 1981, and submitted it for review. Mot. to Dis. or Aff. App. 8-17.[21] The State's submission letter identified various voting changes, reciting that "prior law" provided for three seats to be elected from each district in the First Circuit, while "new law" would provide for four seats per district (*id.* at 10); "prior law" provided for one judge per election district and two at-large judges in the Second Circuit, while "new law" would provide for two judges in each district and would reduce the number of at-large seats to one (*id.* at 11);[22] and "*[p]rior law* provided for alphabetical division * * * within each district of the First Circuit," while "*[n]ew law* provides the same for all court of appeals circuits" (*id.* at 16). The State specifically represented that "prior practices" had been precleared. *Id.* at 17. On the basis of those representations, the Assistant Attorney General declined to interpose objections to "the changes in question." *Id.* at 18. When Acts No. 114 and 305 were finally submitted for

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[20] As an initial matter, it is difficult to determine what documents formed the basis of the district court's conclusion that the State had met its burden of showing prior preclearance, since the State put into evidence only a few of the relevant submission letters and responses from the Attorney General.

[21] Act No. 661 of 1980, also referred to in this submission letter, was superseded in its entirety by Act No. 3 of 1981.

[22] The State represented that there would be "no change" from "prior law" in the number or allocation of judges in the Third Circuit. *Id.* at 12.

preclearance in 1987, the Assistant Attorney General interposed objections to them. J.S. App. 126a.

The district court held that "when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits." The State's submissions, however, plainly did not "in some unambiguous * * * manner submit [the two 1975 statutes] to the Attorney General with a request for his consideration pursuant to the Act." *McCain*, 465 U.S. at 249. The State's explanation of "prior law" in its 1981 submission letter gave no indication that the institution of designated posts in the First Circuit, and the addition of various types of seats in the First, Second, and Third Circuits, had not been precleared. Compare *McCain*, 465 U.S. at 251 n.19, 253 n.23. Indeed, the State expressly represented to the contrary. Compare *McCain*, 465 U.S. at 253 n.23. Nor did the State's 1981 submission provide any information on the law existing prior to 1975. Compare *ibid.* In short, just as in *McCain*, the State's 1981 submission letter was reasonably understood to constitute a submission of Act 3, not its predecessors, and the Attorney General's determination not to object consequently applied only to Act 3.

b. Other changes that the district court held to be unambiguously submitted and precleared likewise were not submitted properly. In one case, the court found (J.S. App. 53a) that the Attorney General's statement that he would not consider a redistricting proposal in light of its defeat in a referendum served to preclear a later statute that created a multimember district by adding a second seat to the district.[23] Cf. 28 C.F.R. 51.22 ("with respect to

[23] See J.A. 118-119, 122-123 (State's submission of referendum on whether the Twentieth District should be split into two and Attorney General's response stating that he "will make no determination * * * since the proposition did not receive voter approval"). The Assistant Attorney General objected to Act 34 of 1981, which added a second seat to the district, by letter of September 23, 1988. J.S. App. 123a.

a change for which approval by referendum * * * is required, the Attorney General *may* make a determination concerning the change prior to such approval") (emphasis added).

The court also found (see J.S. App. 51a) that the Attorney General's decision not to interpose an objection "to the special election for the Tenth Judicial District" (J.A. 101) constituted approval of the redistricting proposal to be voted on at that election. Since the State's letter submitting the special election is not in the record, the district court apparently reached that conclusion without attempting to determine whether the State had unambiguously submitted the change to be voted on at the election (see 28 C.F.R. 51.22), as well as the holding of the election itself.[24] See 28 C.F.R. 51.17. In still other cases, the court assumed that the Attorney General precleared intermediate increases in the number of district court seats elected from multimember districts when he precleared later decisions opting to expand these districts further.[25] In none of those cases can it be concluded that the State's submission letter specified that the State was seeking preclearance of earlier changes, nor did the Attorney General's responses state that preclearance was being granted for such changes. The documentary evidence thus belies the district court's conclusions that those changes were unambiguously submitted and precleared.

[24] The Assistant Attorney General interposed an objection to the redistricting proposal by letter of September 23, 1988. J.S. App. 114a, 122a.

[25] See, *e.g.*, J.S. App. 121a (objection interposed to Act 117 of 1973, adding sixth seat to District One); J.A. 149 (preclearance of eighth seat); J.A. 108, 112, 115 (preclearance of increase from "8 to 9 judges," based on State's representation that "prior practices were precleared").

C. THE DISTRICT COURT SHOULD ADOPT A REMEDY THAT LEAST OFFENDS SECTION 5 AND HAS THE LEAST PROSPECTIVE EFFECT

Appellants urge that the results of elections that improperly went forward pursuant to unprecleared changes should be "set aside, and the case should be remanded to the district court for consideration of any further relief that may be necessary." J.S. 15. If the Court agrees that the district court erred in permitting elections in this case to proceed and the victors to be seated, certain general principles should guide the district court in crafting a remedy.

Where an election has been held employing voting changes that are invalid under Section 5, the election should generally be set aside pending the State's implementation of legally valid election processes, at least in the absence of a demonstration that the seats involved must be filled and that no alternative means of filling them is practicable. Thus, newly created judicial seats that were never filled prior to the invalid election—as is the case with some of the seats at issue here—ordinarily can be returned to their vacant status; it is unlikely that the State will be able to demonstrate a need to fill them immediately. Nonetheless, the State can be expected to make such a showing with respect to its longstanding judicial seats.

Where the State has made such a showing, the district court should use whatever practicable means least offend Section 5 and have least prospective effect to fill the seats in question. In this regard, permitting prior incumbents (*not* those judges who were newly elected and seated as a result of the lower court's order) to hold over in office may well be the preferable method.[26] Although the incumbents

[26] Louisiana by statute authorizes a public officer to "continue to discharge the duties of his office until his successor is inducted into office." La. Rev. Stat. Ann. § 42:2 (West 1990). See, *e.g.*, *Strawitz* v. *Town of Marksville*, 77 So. 2d 597 (La. Ct. App. 1955); Op. La. Att'y Gen. 87-814 (1987). Cf. *Chisom* .v *Roemer*, 853 F.2d 1186, 1191 (5th Cir. 1988). Another alternative may be appointment under Louisiana law by the state Supreme Court. See La. Const. Art. 5 § 22(B) (West 1977 & Supp. 1990). State law precludes such appointed judges from later running for office, thus limiting the prospective effect of this method of filling seats.

may also have been elected under invalid procedures, the remedy puts the State's continued use of those procedures to a stop and thus minimizes the statutory violation. In addition, this method does not create new incumbents, and is therefore likely to have the least prospective effect when new, legally valid elections ultimately are held.[27]

CONCLUSION

The district court's order permitting elections to be held under voting changes to which the Attorney General has objected should be reversed and remanded with instructions to enter an injunction barring future elections "unless and until" preclearance is obtained.[28] The district

[27] Appellees' contention that "the United States Attorney General has taken the position that [judges elected pursuant to the district court's order] should be permitted to take office on a provisional basis" is mistaken. See Mot. to Dis. or Aff. 25. In support of their contention, appellees quote a sentence out of context from a district court filing (J.A. 259-267) by the United States addressing remedial matters. The filing was dated January 4, 1991, and referred to the situation created by the district court's order permitting elections to go forward and provisionally seating the victors; it did not address the validity of that order. If read in context, the passage quoted by appellees—"incumbents elected prior to the 1990 election cycle should [not] be treated differently from those judges elected as a result of the October 1990 elections" (Mot. to Dis. or Aff. 25)—urged the court to permit prior incumbents to hold over. It did not suggest or endorse the district court's decision to permit those elected in October 1990 to take office on a provisional basis.

[28] On January 18, 1991, this Court also granted certiorari in *Chisom* v. *Roemer*, No. 90-757 (consolidated with *United States* v. *Roemer*,

court's ruling that changes affecting voting had been precleared for the seats listed in Part I of its October 22, 1990, order also should be reversed.[29]

Respectfully submitted.

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No. 90-1032) and *Houston Lawyers' Ass'n* v. *The Attorney General of Texas*, No. 90-813 (consolidated with *LULAC* v. *The Attorney General of Texas*, No. 90-974). Those cases involve the application *vel non* of the results test of Section 2(b) of the Voting Rights Act to elected judges. The statutory term that creates the Section 2(b) issue—"representatives"—does not appear in Section 5. Cf. *LULAC*, 914 F.2d at 629. Therefore, this Court's decisions in *Chisom* and *LULAC* are unlikely to affect the issues in this case. The Court's decisions may, however, bear on the validity of some of the objections interposed by the Attorney General to voting changes at issue in this case. Cf. 28 C.F.R. 51.55(b)(2). Insofar as the Court's decisions do so, that effect may be raised either before the Attorney General in a request for reconsideration or in the pending Section 5 declaratory judgment action.

[29] The court's order should be affirmed with respect to Division D of District 34; Divisions A, B, C, and D in District 17; and Division C in District 32. See notes 3, 16, *supra*.

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